

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

affidavit of mailing
attached

75-1358

To be argued by
VICTOR J. ZUPA

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R/L

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1358

UNITED STATES OF AMERICA,
Respondent-Appellee,

—v.—

LOUIS WOLFISH,
Petitioner-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE RESPONDENT

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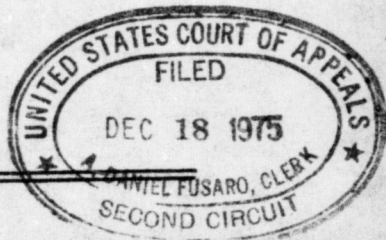


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—v.—

LOUIS WOLFISH,
Petitioner-Appellant.

BRIEF FOR THE RESPONDENT

Statement of the Case

Louis Wolfish appeals to this Court for a review of an order dated September 15, 1975, issued by the Honorable Lawrence W. Pierce, United States District Judge. The order denied Louis Wolfish's request to the Court to examine and copy under the Freedom of Information Act each and every document marked sealed in Court Exhibit 4 during a trial before Judge Pierce in which Louis Wolfish was convicted of three counts of mail fraud (73 Cr. 1036).

Issue Presented

Are the Courts of the United States exempt from the production of sealed exhibits pursuant to a Freedom of Information Act request?

Statement of Facts

Louis Wolfish (hereinafter "Wolfish") was convicted in District Court (S.D.N.Y.) of three counts of mail fraud on January 17, 1975. This Court affirmed the conviction on August 14, 1975, *United States v. Wolfish*, — F.2d —, Slip Opinion at 5633, Docket No. 75-1138 (2d Cir., August 14, 1975). During the trial Mr. C. E. Gotti, a foreign officer with the United States Department of State, testified for the United States as to Wolfish's entrances and departures into and from Israel as shown on Wolfish's passport. Pursuant to 18 U.S.C. § 3500 and *Brady v. Maryland*, 373 U.S. 83 (1963), the United States produced all documents relating to Mr. Gotti's testimony. The trial judge ruled that these documents, examined by him *in camera*, were neither statements made by Mr. Gotti nor statements relating to matters which were the subject of Mr. Gotti's direct testimony as required by 18 U.S.C. § 3500 (3a-4a).^{*} Wolfish took exception to the ruling and the trial judge ordered the documents sealed and marked as Court's Exhibit 4 (hereinafter "Court Exhibit 4") (5a-6a). This Court specifically affirmed the trial court's ruling as to Court Exhibit 4, *United States v. Wolfish*, *supra*, at 5643.

By letter dated September 12, 1975 Wolfish made demand under the Freedom of Information Act on Judge Pierce to produce Court Exhibit 4(2a). By order dated September 15, 1975, Judge Pierce denied Wolfish's demand stating that "[t]he provisions of 5 U.S.C. § 551(1) (B) specifically exclude the courts of the United States

^{*} References followed by "a" are to the joint appendix.

from the operation of the Administrative Procedure Act".*

Relevant Statutes

5 U.S.C. § 551 provides in relevant part as follows:

§ 551 Definitions

For the purpose of this subchapter

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

* * * * *

(B) the courts of the United States;

5 U.S.C. § 552(e), as amended, Pub. L. 93-502, Nov. 21, 1974, 88 Stat. 1561-1564, 1 U.S. Code Annotated, New Laws and Court Constructions, Feb. 1975 at p. 41, provides as follows:

§ 552 Public information; agency rules, opinions, orders, records and proceedings.

* * * * *

(e) For purposes of this section, the term 'agency' as defined in section 551(1) of this title

* On August 5, 1975, Wolfish also commenced an action in the United States District Court (S.D.N.Y.) against the United States, the Dept. of Justice, Postal Service, Dept. of State, Customs Service, FBI and CIA seeking all records, documents and investigatory material pertaining to him under the Freedom of Information Act, 75 Civ. 3815 (DBB). On October 11, 1975, Wolfish commenced yet another action in the United States District Court (S.D.N.Y.) under the Freedom of Information Act against the United States, the Dept. of Justice, and the FBI, seeking all records, documents and investigatory material pertaining to him, 75 Civ. 4810 (CBM). Those actions were consolidated by order dated December 9, 1975 and filed December 12, 1975, under 75 Civ. 3815 (DBB) which is still pending before the District Court.

includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President) or any independent regulatory agency . . .

ARGUMENT

The courts of the United States are exempt from the production of sealed exhibits pursuant to a Freedom of Information Act request.

The intent of the Freedom of Information Act, 5 U.S.C. § 552, is to make available to the public information (with certain exceptions) maintained by an "agency" as defined in the Administrative Procedure Act, 5 U.S.C. § 551(1), and 5 U.S.C. § 552(e). The definition of an "agency" in 5 U.S.C. § 551(1) specifically excludes the courts of the United States. *Cook v. Willingham*, 400 F.2d 885 (10th Cir. 1968), (*per curiam*); see *Soucie v. David*, 448 F.2d 1067, 1073 n. 17 (D.C. Cir. 1971). As Judge Pierce correctly found, the unambiguous language of the statute is dispositive of this case.

In his brief, Wolfish seeks Court Exhibit 4 as containing documents originating from an administrative agency. He contends that these documents may have been deposited with the trial court to avoid compliance with the Freedom of Information Act. His argument is frivolous, since the documents were furnished to the court in compliance with the mandate of 18 U.S.C. § 3500 and were properly so reviewed by both the District Court and Court of Appeals. *United States v. Wolfish*, *supra*.

Regardless, the Freedom of Information Act sets forth detailed provisions concerning the procedures to be fol-

lowed in obtaining records from an agency. It is clear that the Freedom of Information Act requires requests for records to be made in the first instance to the "agency" maintaining the records and in accordance with the rules promulgated by that agency. 5 U.S.C. § 552(a)(4)(A), as amended. In addition, if records are withheld by an agency after a request made in accordance with the Freedom of Information Act, the Freedom of Information Act provides for an action against that agency in an appropriate district court of the United States to determine the matter *de novo*. 5 U.S.C. § 552(a)(4)(B), as amended. The complainant, of course, must have exhausted his administrative remedies. *Aviation Consumer Action Project v. CAB*, 370 F. Supp. 945, 947 (D.D.C. 1972), *aff'd*, 480 F.2d 1195 (D.C. Cir. 1973); see *Farrell v. Ignatius*, 283 F. Supp. 58 (S.D.N.Y. 1968).

Thus, under the Freedom of Information Act the proper course of action for Wolfish to have followed was to have exhausted his administrative remedies, and if the agency declined to disclose the requested documents, to then file an action against that agency in the appropriate district court of the United States. Thus, even assuming *arguendo* that the agency in question intentionally sought to frustrate the Freedom of Information Act by depositing the documents with an authority not subject to the Freedom of Information Act and did not retain any copies itself, a highly unlikely proposition, Wolfish has a remedy.*

Wolfish's statement and attempted distinction to the effect that "the intent of Congress was that internal Court documents would be exempt from disclosure but not other agency documents deposited for safekeeping" has no basis and would indeed lead to some absurd results,

* He has filed such actions, 75 Civ. 3815 (DBB) and 75 Civ. 4810 (CBM), and cannot litigate those matters on this appeal.

placing an impossible burden on the courts which was not intended by the Congress. The result he seeks would emaciate the *in camera* provisions of 18 U.S.C. § 3500 in that the trial court would not only have to determine if the statement related to the direct testimony of a witness as required by § 3500—but would also have to determine if it was subject to disclosure under the Freedom of Information Act. All this, of course, *without* the benefit of prior agency action on an administrative request as required by the Freedom of Information Act, and notwithstanding the exemption for the Courts specifically contained in 5 U.S.C. § 551(1)(B) and 552(e). His position must therefore be rejected.

CONCLUSION

This appeal should be dismissed.

Dated: New York, New York
December , 1975

Respectfully submitted,

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*United States Attorney for the
Southern District of New York,
Attorney for Respondent.*

VICTOR J. ZUPA,
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AFFIDAVIT OF MAILING

CA 75-1358

State of New York)
County of New York)

Pauline P. Troia, being duly sworn,
deposes and says that she is employed in the Office of the
United States Attorney for the Southern District of New York.

That on the 18th day of
 two copies
December 1975 she served ~~a copy~~ of the within
Govt's brief

by placing the same in a properly postpaid franked envelope
addressed:

Stanley H. Fischer, Esq.,
2 Park Ave.
New York, NY 10016

And deponent further says
she sealed the said envelope and placed the same in the
mail chute drop for mailing in the United States Courthouse, Annex,
~~Finley Square~~, Borough of Manhattan, City of New York.
One St. Andrews Plaza,

Pauline P. Troia

Sworn to before me this

18th day of December 1975

Ralph I. Lee

RALPH I. LEE
Notary Public, State of New York
No. 41-2292838 Queens County
Term Expires March 30, 1977